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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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Petitioner Diane M. Place submits this supplemental memorandum in support of her Petition for Rehearing.

As is set out more fully in the Petition for Rehearing, the United States in *Brown* v. *General Services Administration,* 507 F.2d 1300 (2d Cir. 1974) argued in the Second Circuit that section 717 *does* apply to acts of discrimination occurring before March 24, 1972, the direct opposite of the position taken by the government in the Sixth Circuit in the instant case. By successfully advancing conflicting arguments in different courts of appeals the United States thus brought about a conflict between those circuits. A Petition for a Writ of Certiorari was filed in *Brown* v. *General Services Administration* on December 20, 1974. No. 74-768. In view of the government's role in creating this conflict between *Brown* and the instant case, it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court which decision the

United States maintained was correct. Instead, the Solicitor General opposed certiorari in *Brown*, as he did in this case, while refusing to take any position on the merits of the decision,[1] so as to leave government attorneys free to continue to advance conflicting arguments in the lower courts. Thus the United States, having successfully advanced inconsistent positions in two courts of appeals, now asks this Court to simultaneously uphold *both* of the conflicting decisions. Petitioner submits that it would be inappropriate to do so in light of this Court's responsibility to maintain uniformity among the circuits and to relieve the lower federal courts of the burden of resolving questions which arise solely because of the government's refusal to adhere to a single position.

Petitioner also asserted below and in this Court that federal jurisdiction over her claims existed under several federal statutes enacted prior to section 717, including 28 U.S.C. § 1361, an argument which the Sixth Circuit rejected. In opposing Certiorari in the instant case, the Solicitor General took no position on the merits of this argument. The petitioner in *Brown* also argued that federal jurisdiction existed under these earlier statutes. In *Brown* the Solicitor General contested the existence of such jurisdiction on the sole ground that Brown had not exhausted his administrative remedies.[2] In the instant case, however, petitioner Place did exhaust her administrative remedies. It thus appears that, in opposing Certiorari on this issue in the instant case, the Solicitor General is asking this Court to uphold a decision which he believes to be incorrect.

The failure of the Solicitor General to take a position on the merits of the issues raised by this case, as his

[1] Brief for Respondents in Opposition, *Brown* v. *General Services Administration*, No. 74-768, p. 5.

[2] *Id.*, p. 6.

similar failure in *Brown*,[3] is not fortuitous. It arises, as the Solicitor General has indicated,[4] from the differing interests and positions within the Department of Justice between the Civil Division, which is primarily concerned with winning civil suits against the United States, and the Civil Rights Division, which is primarily concerned with ending discrimination. Both fairness to individual litigants and the efficient administration of justice require that the Attorney General resolve these differences and enunciate unequivocally the position of the United States on the important questions of law at issue.

Accordingly, the government should be directed to respond to the Petition for Rehearing and to state its position on the following questions of law:

(1) Does section 717 of the Equal Employment Opportunity Act of 1972 provide a remedy for acts of discrimination occurring before March 24, 1972?

(2) Is federal jurisdiction over discrimination in employment by the United States on the basis of race or sex provided by 5 U.S.C. §§ 703-706, 28 U.S.C. §§ 1331, 1346, 1361, or 42 U.S.C. § 1981?

[3] See Reply Memorandum in Support of Petition for Writ of Certiorari, *Brown* v. *General Services Administration*, No. 74-768.

[4] Letter of Robert Bork to Hon. Michael Rodak, regarding *Brown* v. *General Services Administration*, dated February 11, 1975.

Respectfully submitted,

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